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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OMNITRANS, Plaintiff and Appellant, v. PENN OCTANE CORPORATION et al., Defendants and Respondents.	E031846 (Super.Ct.No. SCV64898) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Cynthia Ludvigsen, Judge. Affirmed.

Atkinson, Andelson, Loya, Ruud & Romo, Steven D. Atkinson, Eugene F. McMenamin and John W. Dietrich for Plaintiff and Appellant.

Bertrand, Fox & Elliot, Gregory M. Fox and Nancy A. Huneke for Defendants and Respondents.

Plaintiff and appellant Omnitrans, a joint powers transportation authority, sued defendants and respondents, Penn Octane Corporation and Penn Wilson CNG, Inc. (Penn Octane and Penn Wilson, respectively), for breach of contract, breach of warranty,

negligence, deceit, and other causes of action arising out of alleged difficulties with the construction of a compressed natural gas (CNG) fueling station for Omnitrans. The trial court granted Penn Octane's and Penn Wilson's motion for summary judgment and dismissed the action. Omnitrans appeals.

FACTS AND PROCEDURAL HISTORY

In 1995, Omnitrans contracted with A&A Associates (A&A) to build a CNG fueling station in Montclair for Omnitrans's bus fleet. A&A and its principal subcontractor, Wilson Technologies, Inc. (Wilson Technologies), began work in 1995. Both A&A and Wilson Technologies were owned by Zimmerman Holdings, Inc. (Zimmerman).

The station was supposed to have been completed by November of 1995. Delays occurred. The station also failed to meet emissions standards set by the South Coast Air Quality Management District (SCAQMD), and the builders ultimately abandoned the project in March of 1999.

In the meantime, in 1997, while work on the project was ongoing, Penn Octane purchased the assets of Wilson Technologies from Zimmerman.

The crux of the dispute appears to center on the connection of Penn Octane and Penn Wilson to the negligent or otherwise inadequate performance of A&A and Wilson Technologies under the contract.

Omnitrans's first amended complaint alleged that A&A was nothing but an underfunded shell corporation, wholly controlled by, and operated as the alter ego of,

Wilson Technologies. As noted, Zimmerman owned both A&A and Wilson Technologies.

According to the first amended complaint, Penn Octane purchased Wilson Technologies from Zimmerman in approximately March of 1997. Penn Octane then created a wholly-owned subsidiary entity, ultimately named Penn Wilson CNG, Inc., which took over Wilson Technologies' operations; Omnitrans alleged, "PENN OCTANE CORPORATION used and purchased the WILSON [TECHNOLOGIES] name to take advantage of the WILSON name and reputation as a leading supplier of CNG (compressed natural gas) refueling stations, and further obtained WILSON[] [TECHNOLOGIES'] technology and employees, in exchange for payment of fees and royalties. As part of the same transaction, . . . [Zimmerman] reimbursed PENN OCTANE CORPORATION for 50% of the net operating cash deficit of PENN WILSON CNG, INC. Additionally, PENN WILSON . . . [,] under this arrangement, was allowed to and did continue to use the WILSON [TECHNOLOGIES] premises, inventory and name."

Omnitrans alleged that Penn Wilson was, in its turn, "a mere shell and sham . . . conceived, intended and used by defendant PENN OCTANE CORPORATION and [Zimmerman] as a device to avoid liabilities and financial responsibilities of A&A, WILSON [TECHNOLOGIES] and PENN WILSON . . . and for the purpose of substituting a financially insolvent corporation in place of defendants PENN OCTANE CORPORATION and [Zimmerman]." Ultimately, Omnitrans alleged, Penn Wilson was

the alter ego of Penn Octane, which used Penn Wilson for its own purposes, "by placing the assets of defendants WILSON [TECHNOLOGIES] and PENN WILSON . . . in the name of PENN WILSON . . . as its wholly owned subsidiary in order to avoid payment of the obligations owed to the creditors of defendants WILSON [TECHNOLOGIES] and PENN WILSON . . . ."

Omnitrans's complaint set forth the relevant portions of the construction contract, including requirements that the builder obtain an air emissions permit for the natural gas engines, and that the builder would be "responsible for contacting SCAQMD to confirm permit requirements." A&A, through Safeco Insurance Company of America (Safeco), had tendered a performance bond for the work. The contract also contained a guaranty, which included an attorney fees provision.

As the bidding contractor, A&A was required to have a valid contractor's license. Omnitrans alleged that A&A was in fact unlicensed. The fueling station was supposed to be commissioned and operational by November 30, 1995. By May of 1997, the station was still not complete. Omnitrans notified Safeco of its intent to claim under the performance bond. Omnitrans also notified Wilson Technologies, A&A's agent, of its intent to declare A&A in default; Omnitrans further demanded that A&A cure its deficient performance and complete the project. Omnitrans's complaint alleged that "A&A and SAFECO gave verbal assurances to OMNITRANS to forestall OMNITRANS from declaring A&A in default."

Omnitrans further alleged that, by July of 1997, A&A and Wilson Technologies were "defunct non-operating corporations that had shut down operations in response to multiple claims and/or lawsuits," brought because A&A and Wilson Technologies had defaulted on other public agency CNG station construction contracts. Omnitrans claimed that Safeco was fully aware of A&A's and Wilson Technologies' defunct status, and that Safeco knew claims had been made on other performance bonds it had issued for A&A for construction of other CNG stations.

In early 1998, Safeco took over the contract work. In October of 1998, the station failed an emissions test. In March of 1999, the station again failed emissions tests. As a result, the station failed to obtain necessary permits, and "remains unavailable for use."

On April 2, 1999, Omnitrans notified A&A and Safeco that they were terminated for nonperformance under the contract. Omnitrans demanded the penal sum of the performance bond, and demanded that Safeco indemnify Omnitrans for damages for breach of the contract. Safeco replied that it "would take no further action to satisfy its obligations as surety without [a] court order," and notified Omnitrans that A&A refused to take any further action on the project "' . . . until its account is cleared and it has been fully reimbursed for all of its cost overruns.'" A&A claimed that its inability to meet emissions standards was the fault of Omnitrans.

Omnitrans's action included causes of action against A&A for breach of contract, breach of express warranty, and breach of the implied warranty of fitness and merchantability, against Safeco for enforcement of the performance bond, and for

damages over the penal sum of the bond, because Safeco had undertaken performance under the contract. In addition, Omnitrans sued all the named defendants for negligence and deceit, and all defendants except Safeco for "Alter Ego and Declaratory Relief."

Penn Octane and Penn Wilson answered the first amended complaint, and Penn Octane then moved for summary judgment or summary adjudication. Penn Octane urged that it was not responsible for the negligent design, manufacture, or construction, or otherwise, of the CNG fueling station. In addition, Penn Octane could not be liable for deceit because it had engaged in none, and there was insufficient showing of identity of interests to "pierce the corporate veil" between Penn Octane and Penn Wilson, or between Penn Octane and Penn Wilson, on the one hand, and A&A and Wilson Technologies, on the other.

In support of its motion, Penn Octane alleged certain undisputed facts. As to the eighth cause of action, for "alter ego," Penn Octane indicated that it was a Delaware corporation which had never been in the business of constructing, designing or manufacturing CNG facilities.

In February of 1997, Penn Octane created "Wilson Acquisition Corporation," (WAC) the predecessor of Penn Wilson, to acquire certain assets and liabilities of Wilson Technologies. WAC/Penn Wilson was a corporation created under the laws of Delaware.

WAC/Penn Wilson was intended to develop a transit business in Mexico, using CNG-powered buses; WAC/Penn Wilson wanted to be able to build CNG stations in Mexico for its Mexican bus fleet. The Omnitrans project, including all receivables and

liabilities related to that project, were expressly excluded from WAC's purchase agreement with Wilson Technologies. The purchase agreement between WAC/Penn Wilson and Wilson Technologies provided that assets and employees needed to complete the Omnitrans project, and certain other projects, would be made available to Wilson Technologies; Wilson Technologies would pay WAC/Penn Wilson for the use of these assets and employees.

The purchase agreement "fell through." Thereafter, "WAC purchased certain inventory from [Wilson Technologies], the right to use the Wilson name and the right to hire [Wilson Technologies] employees for $394,000 . . . ."

Penn Octane alleged that Wilson Technologies "retained responsibility for completing the Omnitrans project, and WAC did not purchase [Wilson Technologies]'s stock, intellectual property, accounts receivables, books, other corporate records, accounting ledgers, its federal or state tax returns or its files and records." Any Wilson Technologies employees hired or leased by WAC/Penn Wilson "would be made available for the Omnitrans Project, and they were made available to [Wilson Technologies]."

Penn Octane also asserted that no officers or board members of Zimmerman, A&A or Wilson Technologies served as officers or board members of Penn Octane or Penn Wilson, and conversely that no officers or board members of Penn Octane or Penn Wilson ever served as officers or board members of Zimmerman, A&A or Wilson Technologies. Penn Octane and Penn Wilson had no bank accounts in common with

Zimmerman, A&A or Wilson Technologies. No Penn Octane employees ever worked on the Omnitrans project. Neither Penn Octane nor Penn Wilson had anything to do with Zimmerman, A&A or Wilson Technologies becoming defunct or ceasing operations.

Penn Octane and Penn Wilson were also separate corporate entities. The president of Penn Wilson oversaw all of Penn Wilson's operations, and never held any office in Penn Octane. Penn Octane did not sign the Omnitrans contract and never performed any work on that project.

Penn Octane urged that Omnitrans did not contend that Penn Octane or Penn Wilson knew about any breach by A&A or Wilson Technologies until March of 1999.

Based upon these and other claimed facts, Penn Octane asserted that Omnitrans's evidence was insufficient to show any identity between A&A and Penn Octane, such that Penn Octane should be liable for A&A's breach of the CNG station contract.

Penn Octane further asserted that Omnitrans could not prove its liability for negligent design, manufacture, construction, or otherwise, with respect to the CNG station contract, because (1) Penn Octane was not a signatory to the contract, (2) Penn Octane never performed any work on the contract, (3) the Omnitrans CNG station contract was specifically excluded from the assets WAC/Penn Wilson had purchased from Wilson Technologies, and (4) Wilson Technologies remained responsible for completing the Omnitrans project.

Finally, Penn Octane sought to show that Omnitrans could not prevail on the cause of action for deceit, because Omnitrans's discovery answers demonstrated that it had no evidence that Penn Octane had participated in any deceit.

Omnitrans countered that Penn Octane and Penn Wilson did participate in the decision of Wilson Technologies to cease operations: that is, the "deal facilitated the shut down and cover up by A&A/Wilson [Technologies]. The deal contemplated a comp[l]ete shut down." Omnitrans urged that Penn Octane and Penn Wilson were really alter egos, because "Penn Octane funded all operations of Penn Wilson with loans," and argued that Penn Octane had "actually guaranteed Penn Wilson's performance," and it had given "$100,000 wor[th] of Penn Octane stock to [Zimmerman] to satisfy the deal of Penn Wilson [and Zimmerman]."

Far from conceding that Penn Octane and Penn Wilson had no knowledge of the alleged breach of the Omnitrans contract until 1999, Omnitrans asserted that, while A&A had ultimately *abandoned* the Omnitrans project in 1999, Penn Octane and Penn Wilson had, by their earlier activities in 1997 and 1998, "aided and abetted A&A/Wilson [Technologies] and [Zimmerman] [in] strip[ping] the assets."

As to the cause of action for deceit, Omnitrans urged that, although Penn Octane claimed that there was no evidence showing it had participated in any deceit, in fact "[t]he deceit was by Penn Wilson, Penn Octane's alter ego," through "Penn Wilson's representative, Rick Remington." Thus, while Omnitrans conceded that Penn Octane did

not perform work on the Omnitrans project, "Penn Octane's alter ego, Penn Wilson did perform work on the Omnitrans project."

As to the claim that Penn Octane was the alter ego of A&A, as alleged in the complaint, Omnitrans essentially abandoned that as a direct claim; instead, it asserted that Penn Wilson was the alter ego of Wilson Technologies, which in turn was the alter ego of A&A. Then, because Penn Octane did not observe the corporate separateness of Penn Wilson, Penn Octane should be liable for Penn Wilson's actions as the alter ego of Wilson Technologies and, ultimately, A&A. Omnitrans argued, "[i]t is plainly understood by Penn Octane that Omnitrans' theory of liability as to Penn Octane is derivative only. Omnitrans does not claim that Penn Octane engaged in any affirmative act with regard to the construction of the . . . facility or the tort claims involved in the First Amended Complaint. Instead, Omnitrans seeks to hold Penn Octane liable for any judgment it obtains against Penn Wilson based upon the theory that Penn Octane so dominated and controlled its subsidiary that Penn Octane has lost the protection of being a mere shareholder of its subsidiary and is, instead, its alter ego. [¶] In this motion for summary judgment, Penn Octane . . . argues non-issues about Penn Octane's alter ego status vis-à-vis [A&A]. While such claims were indeed included among various theories alleged in the First Amended Complaint, they are no longer pursued by Omnitrans." Omnitrans noted that, "Penn Wilson is not a moving party here."

The trial court noted at the hearing that Omnitrans had produced no evidence that Penn Octane had ignored the corporate formalities between itself and Penn Wilson. In

addition, another court in another lawsuit had already ruled that Penn Octane and Penn Wilson were not alter egos of one another. The court also granted summary adjudication of issues for Penn Octane on the negligence and deceit causes of action.

Afterward, Penn Wilson also moved for summary judgment or summary adjudication of issues. The motion was transferred to another judge; the court granted Penn Wilson's motion as well. The court thereafter entered judgment in favor of Penn Octane and Penn Wilson, inasmuch as no further causes of action remained as to them. Omnitrans filed notices of appeal from these rulings.

ANALYSIS

I. Standard of Review on Summary Judgment

On appeal after summary judgment, "we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.'"[1]

We follow the same procedure as does the trial court: "We identify issues framed by the pleadings; determine whether the moving party's showing established facts that negate the opponent's claim and justify a judgment in the moving party's favor; and if it

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[1] *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201, quoting *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.

does, we finally determine whether the opposition demonstrates the existence of a triable, material factual issue."[2]

II. Step One -- Issues Framed by the Pleadings

Only three causes of action were alleged against Penn Octane and Penn Wilson: the sixth, for negligent design, the seventh, for deceit, and the eighth, for "alter ego" liability.

As to the negligence cause of action, then, the key issue is whether any evidence showed that either Penn Octane or Penn Wilson had done anything to render them responsible for the alleged negligent design, manufacture, construction, or installation of the CNG station.

The cause of action for deceit was premised on the theory that the defendants conspired with Safeco, the performance bond surety, to prevent Omnitrans from declaring the contract in default; that is, the conspirators led Omnitrans to believe, falsely, that A&A and Wilson Technologies were still viable, operating entities.

The eighth cause of action alleged that Penn Wilson was the alter ego of Penn Octane, and that Penn Octane and Wilson Technologies so dominated and used Penn Wilson, so that there was no separateness between Penn Wilson, on the one hand, and Penn Octane and Wilson Technologies, on the other. The complaint further alleged that

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[2] *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.

there was such a "unity of interest in ownership" of A&A, Wilson Technologies, Zimmerman, Penn Octane and Penn Wilson, that "defendants WILSON [TECHNOLOGIES], [ZIMMERMAN], PENN WILSON CNG, INC. [and] PENN OCTANE CORPORATION are the alter egos of defendant A&A," and that Penn Octane and Penn Wilson should be, on that account, "liable for the corporate acts, errors and omissions, and responsibilities of defendant A&A" under the CNG station contract.

III. Step Two -- Defendants Penn Octane and Penn Wilson Presented Evidence Sufficient to Justify Judgment in Their Favor

Penn Octane and Penn Wilson were entitled, on the evidence presented, to judgment on the negligence cause of action.

Penn Octane's moving papers showed that it had itself done no work on the CNG station. Omnitrans admitted that Penn Octane had never been in the business of building CNG facilities,, that Penn Octane was not a signatory to the contract to build the CNG facility, that Penn Octane had performed no work on the Omnitrans project, and that the receivables and liabilities of the Omnitrans project were expressly excluded from the initial Wilson Technologies purchase agreement. After the purchase agreement fell through, Penn Octane and Wilson Technologies entered into a later agreement to purchase certain inventory from Wilson Technologies, the Wilson name, and the right to hire some Wilson Technologies employees; this later agreement also expressly did not assume liability for the Omnitrans project.

Penn Wilson took the position that it was not liable, because it had performed, at most, some minor service work on the project; liability for the Omnitrans project was expressly excluded from the asset purchase agreement with Wilson Technologies. The agreement with Wilson Technologies provided that Penn Wilson could hire some of the Wilson Technologies employees, but that Penn Wilson would make the employees available for use by Wilson Technologies on the excluded projects, including the Omnitrans project. One such employee was Rick Remington; Remington did work on the Omnitrans project, first as an employee of Wilson Technologies, and then through his own company, "Diversified Wilson Repair, Inc.," also known as "Wilson Tek." With respect to the work Remington did on the Omnitrans project, Penn Wilson (through Bothwell's (officer of Penn Octane Corp.) declaration) averred that it had no supervision or control over the work Remington did on the project; it did not tell him "when to work on the Project, what work to do, what materials to use[,] or how to use them."

These factual assertions were sufficient to establish, in the absence of anything else, that neither Penn Octane nor Penn Wilson had undertaken any duty with respect to Omnitrans's CNG facility, and thus could not be liable for negligent design, construction, repair, installation, workmanship, etc.

Similarly, Penn Octane and Penn Wilson demonstrated that they were entitled to judgment on the deceit cause of action. Penn Octane and Penn Wilson had propounded interrogatories to Omnitrans, specifically asking Omnitrans to identify any evidence pointing to an agreement by Penn Octane or Penn Wilson to communicate through

Safeco, or upon which Omnitrans based its claim that Penn Octane or Penn Wilson had made any misrepresentation. Omnitrans's answers to interrogatories had stated no facts, but merely recited the allegations of the complaint, and claimed that the questions could not be answered because discovery had not been completed.

Finally, Penn Octane's and Penn Wilson's evidence entitled them to judgment on the cause of action for alter ego liability.

Bothwell's declaration averred that Penn Octane and Penn Wilson had kept strictly separate meetings, books, records, minutes, and other papers and formalities. Their assets were kept separate. Omnitrans admitted that no officer or board member of A&A, Wilson Technologies or Zimmerman ever served on the board of Penn Octane or Penn Wilson, nor did any Penn Octane or Penn Wilson officers serve on the boards of A&A, Wilson Technologies, or Zimmerman. Bothwell further averred that neither Penn Octane nor Penn Wilson had had any input into the corporate decisions of either A&A or Wilson Technologies to cease operations.

On the face of Penn Octane's and Penn Wilson's showings, they had shown they were not liable for negligence, they had engaged in no deceit, and they had maintained proper separate corporate existence, as to each entity involved.

IV. Step Three -- Omnitrans Failed to Raise a Triable Issue of Fact as to Any of the Causes of Action

We come now to the crux of the case: whether Omnitrans successfully raised a triable issue of fact as to any of the three causes of action affecting Penn Octane or Penn Wilson.

A. Negligence of Penn Wilson

To prevail on a claim of negligence, the plaintiff must prove that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the breach was a proximate or legal cause of the injury.[3] The critical elements for our purposes here are duty and causation. Omnitrans argues that it presented evidence sufficient to raise a triable issue of material fact as to these issues.

As to duty, it is axiomatic that "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . ,"[4] Penn Wilson claims, however, that it performed no "willful acts" and did no "management of . . . property or person[s]" which affected Omnitrans's CNG station in any material way. That is, Penn Wilson argues, it cannot be found to have a duty with respect to "design, manufacture, construction," or similar acts concerning the CNG station, unless it somehow participated

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[3] *Sharon P. v. Arman, Ltd*. (1999) 21 Cal.4th 1181, 1188, overruled on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.

in these activities. Penn Wilson maintained that it had done only minor service work on the project.

In support of its claim that it raised evidence showing that Penn Wilson had done more than mere "minor service work" on the project, Omnitrans relied on an advertising or promotional brochure prepared by Penn Wilson, indicating that Penn Wilson had "completed" the Omnitrans project.

The trial court excluded the brochure as inadmissible hearsay, and noted that it was "too unspecific to be proof of anything." Omnitrans counters that the court's evidentiary ruling was erroneous: Omnitrans argues that the brochure, prepared by Penn Wilson, is an admission of a party, and therefore admissible.[5]

Even if admissible, the brochure does not "admit" anything with respect to the issues to be proven at trial. Penn Wilson demonstrated that the brochure was intended for use in Mexico as a marketing tool. Its text anticipated the purchase of Wilson Technologies's assets under the original purchase agreement, and therefore touted a number of Wilson Technologies projects; the agreement to purchase Wilson Technologies's assets fell through, however.

[footnote continued from previous page]

[4] Civil Code section 1714, subdivision (a).

[5] Evidence Code section 1220; *Legg v. United Benefit Life Ins. Co*. (1951) 103 Cal.App.2d 228, 229 ["An admission is a statement made by a party to a proceeding suggesting an inference as to any fact in dispute or relevant to any such fact and to be admissible must tend to prove or have a material bearing on the issues in the case"].

As Penn Wilson points out, the claim that the brochure is evidence that Penn Wilson somehow went behind Omnitrans's back and completed the CNG station, "unbeknownst to Omnitrans until the brochure surfaced in this litigation[,] is ludicrous." Omnitrans is well aware that the CNG station remains uncompleted -- that is the gist of its complaint. Omnitrans's reliance on the brochure, as Penn Wilson asserts, "serves only to highlight [the] lack of any actual evidence of a causal connection between [Penn Wilson's] minor service work and the failure of the Project."

Omnitrans's opposition to Penn Wilson's motion for summary judgment betrays its own understanding of the brochure as mere "puffing" -- "Through this literature, PENN WILSON CNG sought to garner further business by taking credit for the OMNITRANS project." The brochure is not, however, evidence of any acts undertaken by any Penn Wilson employees, and it demonstrates exactly nothing about who did what, or what responsibility should be assigned to whom for the actual work done on the site.

Omnitrans next attempts to dispute Penn Wilson's "minor service work" claim by pointing to certain Penn Wilson invoices; Omnitrans claims that these invoices demonstrate that Penn Wilson "performed at least $67,000 worth of work on the Project. These invoices also demonstrate," Omnitrans asserts, "that work on the Project continued past the originally anticipated completion date . . . and continued through 1998, well after the formation of Penn Wilson CNG." Omnitrans argues that its evidence further showed "that Remington, [Penn Wilson's] Director of Program Management," had written a

notation indicating "that Penn Wilson . . . had performed significant work on the Project, [and had] incurred costs for labor, supervision and materials."

Penn Wilson notes that almost all of the specified invoices are bills from Penn Wilson to Wilson Technologies. Five of seven invoices to Wilson Technologies do not identify the funds paid to any particular Wilson Technologies project, and thus are not demonstrated to be payments for the Omnitrans station. In addition, the existence of the invoices does not prove that Penn Wilson did any major construction on the Omnitrans project; the agreement between Penn Wilson and Wilson Technologies called for Penn Wilson to make employees available to Wilson Technologies for the Safeco projects still under construction, and for reimbursement of these employees' salaries. The invoices reflect nothing more than Wilson Technologies's reimbursement payment to Penn Wilson for the loan of the employees to Wilson Technologies.

Two invoices are clearly identified to the Omnitrans project. One shows that Penn Wilson billed Wilson Technologies for reimbursement for 98.6 hours of work by employees loaned to Wilson Technologies. The other is for approximately $100.00 for steel for the Omnitrans project.

Penn Wilson admits that its invoice to subcontractor Weatherford Enterra, for labor and materials, did refer to work performed on Omnitrans's station. That invoice was for approximately $17,000..

The invoices do not demonstrate that Penn Wilson performed any major work on the Omnitrans project.

Omnitrans next argues that Penn Wilson "sought to revise the purchase agreement with [Zimmerman] as a result of" costs Penn Wilson incurred on the Omnitrans project, and surmises that Penn Wilson therefore must have done substantial work on the project. The evidence -- consisting of some memoranda written by Bothwell, Penn Wilson's CEO -- shows no such thing.

As Penn Wilson points out, the memoranda "express . . . disappointment that the value of assets and service contracts to be purchased," under the original purchase agreement, "was significantly less than anticipated." None of the memoranda specifically references the Omnitrans project, however. Although Bothwell lamented that some of the inventory intended to be purchased had been "inadvertently disposed of . . . and/or were used by [Wilson Technologies] to complete Safeco jobs," this statement proves nothing in particular with respect to the Omnitrans CNG station. The Omnitrans project was only one of several Safeco jobs; neither the original purchase agreement nor the ultimate purchase of some of Wilson Technologies's inventory and name included purchase of any of the Safeco contracts. Penn Wilson's concern over the value of the assets it *had* agreed to purchase in no way referred to matters which had been *excluded* from the purchase agreement -- i.e., the Safeco contracts.

The sum total of Omnitrans's evidence showed that Penn Wilson had done approximately $17,000 worth of repairs to existing equipment at the Omnitrans facility. This was not a substantial involvement in the design, manufacture, or construction of the Omnitrans CNG station.

In a closely allied argument, Penn Wilson also asserted that Omnitrans could not establish the element of causation (i.e., that anything Penn Wilson did was responsible for Omnitrans's damages). A plaintiff meets the causation element by showing, in part, the breach of a duty to exercise ordinary care, which was a substantial factor in bringing about plaintiff's harm.[6] Given the dearth of evidence of Penn Wilson's involvement in any aspect of the design, manufacture, or construction of the CNG station, Penn Wilson's actions could hardly have been the cause of Omnitrans's damages.

Omnitrans asserts that, even if Penn Wilson did not directly perform substantial work on the project, its alleged employee, Rick Remington, did. Omnitrans argues that it raised a triable question of fact whether Penn Wilson should be liable under the doctrine of respondeat superior for Remington's actions.

As noted, Bothwell's declaration averred that Remington never worked for Penn Octane in any capacity, and Remington performed no work on the Omnitrans project as an employee of Penn Wilson. Rather, Remington was an employee loaned back to Wilson Technologies. All work Remington performed on the project was done either as an employee of Wilson Technologies, or as an employee of his own company, Diversified Wilson Repair, Inc., or Wilson Tek. Penn Wilson, through Bothwell, averred that it had no control over any of the work Remington did on the project.

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[6] *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 426.

Omnitrans responds that "[t]here is no injustice in applying the doctrine of respondeat superior," as to Remington's work on the project, because Remington was Penn Wilson's employee, and Penn Wilson "profited" from Remington's work: that is, Wilson Technologies paid Penn Wilson for Remington's services, as a loaned employee.

Omnitrans asserts that vicarious liability is appropriate where an employee is "'engaged in the duties which he was employed to perform' [or] 'those acts which incidentally or indirectly contribute to the [employer's] service,'" citing *Harris v. Oro-Dam Constructors*.[7] Omnitrans's reliance on *Harris* is inapposite here. *Harris* involved the application of the "'going and coming rule,'" which "ordinarily insulates the employer from liability for the negligent driving of an employee enroute to or from work."[8] The question there was whether the payment of travel expenses rendered the employee's trip, between the workplace and home, an "incidental benefit" to the employer. It did not. "When a trip for the employee's benefit concurrently produces some additional benefit to the employer, an abstract employment relationship may result. [Citation.] The obverse is not true, that is, hypothesizing an abstract relationship will not produce a benefit where none exists in fact. Payment of a transportation allowance, without more, is equally ineffectual to produce a benefit."[9] Fundamentally, the question came down to the traditional criteria of control and benefit. The court noted that "[t]he

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[7] *Harris v. Oro-Dam Constructors* (1969) 269 Cal.App.2d 911, 916.
[8] *Harris v. Oro-Dam Constructors*, *supra*, 269 Cal.App.2d 911, 912.

going and coming rule recognizes that travel between home and work is primarily for the employee's benefit."[10] The payment of a travel allowance for employees who lived outside a 15-mile radius of the workplace did not alter the essential purpose of the trip, which was personal. Moreover, the employer had no right to direct or control the means, route, manner of travel, speed, or any other characteristic of the trip; indeed, the court noted that the employer could not even control whether the trip took place at all.[11] Thus, the employer was not liable in respondeat superior for the tortious act of the employee while coming and going to and from work, notwithstanding the payment of a travel allowance.

In fact, the law clearly indicates that lending an employee to another employer does not impose respondeat superior liability on the lending employer. "' . . . [W]hen an employer lends an employee to another employer and relinquishes to the borrowing employer all right of control over the employee's activities,'"[12] a "'special employment'" relationship is created. The "special" -- i.e., borrowing -- employer has the power of control over the borrowed employee's work; consequently, "[d]uring periods of

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[footnote continued from previous page]

[9] *Harris v. Oro-Dam Constructors*, *supra*, 269 Cal.App.2d 911, 917.
[10] *Harris v. Oro-Dam Constructors*, *supra*, 269 Cal.App.2d 911, 917.
[11] *Harris v. Oro-Dam Constructors*, *supra*, 269 Cal.App.2d 911, 918.
[12] *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 984.

'transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts.'"[13]

Here, as to the work Remington performed on the project, Wilson Technologies, not Penn Wilson, was the employer. Wilson Technologies, not Penn Wilson, received the benefit of those services. If any profit was to be made from the Omnitrans contract, it inured to the benefit of Wilson Technologies, not Penn Wilson. Penn Wilson had already shown that it had no right to direct, in any manner, what Remington did, if anything, on the Omnitrans job. "[T]he right of control 'goes to the very heart of the ascription of tortious responsibility.'"[14] Omnitrans failed to demonstrate any facts to overcome Penn Wilson's showing that it had no right to direct Remington's employment on the Omnitrans CNG station jobsite. Wilson Technologies was the "special employer," and thus had sole respondeat superior liability for Remington's activities.

In short, Omnitrans has failed to raise a triable issue of material fact whether Remington was acting as Penn Wilson's employee when he performed work on the project, and whether Penn Wilson should be vicariously liable for anything that Remington did in connection with the Omnitrans project. Omnitrans has failed to demonstrate the existence of any triable issue of fact concerning any duty by Penn

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[13] *Wilson v. County of San Diego*, *supra*, 91 Cal.App.4th 974, 984.
[14] *Harris v. Oro-Dam Constructors*, *supra*, 269 Cal.App.2d 911, 917.

Wilson concerning the construction of the Omnitrans CNG facility, or any acts by Penn Wilson which caused Omnitrans's damages.

The trial court properly granted summary judgment in favor of Penn Wilson on the negligence cause of action.

B. Negligence of Penn Octane

Omnitrans's theory of liability of Penn Octane for negligence appears to hinge on allegations of alter ego: Wilson Technologies was the alter ego of A&A, Penn Wilson was the alter ego of Wilson Technologies, or, at a minimum, Penn Octane was the alter ego of Penn Wilson, and thus Penn Octane should be liable for the defective CNG station because of its ties to A&A, Wilson Technologies, or Penn Wilson. Absent alter ego liability, Omnitrans failed to demonstrate any manner in which Penn Octane should be liable for negligent design, manufacturing, construction, maintenance, or other acts with respect to the Omnitrans CNG station. If summary judgment was proper as to Penn Octane on alter ego liability (see discussion *infra*), there is no liability for negligence.

C. Deceit by Penn Wilson

A cause of action for deceit may be predicated on any of a variety of material misrepresentations: "deceit . . . is either:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

"2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

"3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

"4. promise, made without any intention of performing it."[15]

The gist of Omnitrans's deceit cause of action was that the various entities involved conspired together to deal with Omnitrans through Safeco, and that this method of communicating with Omnitrans was intended to give assurances to Omnitrans that work was proceeding, and to prevent Omnitrans from discovering that A&A and Wilson Technologies were defunct. The ultimate purpose of this ruse was to prevent Omnitrans from declaring the contract in default, and exercising its rights under the Safeco performance bond.

Penn Wilson presented evidence that it had participated in no such conspiracy, and had made no representations to Omnitrans. Among other things, Penn Wilson pointed to Omnitrans's discovery answers, in which Omnitrans was unable to identify any evidence that Penn Wilson had participated in any cover-up scheme to hide A&A's or Wilson Technologies's status from Omnitrans.

Omnitrans insists that it "set forth evidence in opposition to the motion, upon which reasonable inferences can be made, which belie[d] [Penn Wilson's] claims."

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[15] Civil Code section 1710.

First, Omnitrans argued that its answers to interrogatories numbers 11, 12, 15 and 17 constituted evidence that Penn Wilson had participated in deceit. Penn Octane's special interrogatory number 11 requested Omnitrans to state all facts in its possession indicating that "'defendants embarked on a common plan of action' to keep OMNITRANS 'from learning the true facts regarding the condition of A&A and thereby forestall a declaration of default from OMNITRANS.'" Omnitrans's only response was that discovery was ongoing.

Special interrogatory number 12 asked Omnitrans to state "all facts that support your contention that 'defendants agreed to communicate with OMNITRANS through SAFECO.'" Omnitrans simply "object[ed] . . . on the grounds that [the interrogatory] misstates the allegations contained in the First Amended Complaint," but otherwise responded simply that it "*alleges in the First Amended Complaint* that all defendants . . . agreed to hide the fact that A&A Associates, Inc. and Wilson Technologies, Inc. were financially insolvent and had ceased business operations from [Omnitrans] and maintain the rouse [*sic*, ruse] of [their] continued existence. [Omnitrans] further responds that *the First Amended Complaint alleges* that all defendants . . . agreed to have Safeco Insurance Company of America communicate these false statements to [Omnitrans]. Thus, Safeco . . . actually communicated the false statements to [Omnitrans] in furtherance of a common plan and scheme agreed to by all defendants . . . ." (Italics added.) Omnitrans's only other answer was to state that discovery was ongoing, and that it was therefore unable to provide an adequate response.

Interrogatory number 15 called upon Omnitrans to identify all facts supporting its "contention that defendants knew about the facility, including the bidding for the contract to construct the facility, the contract for the facility, and problems with the construction of the facility, or any other matter which relates to the facility, at any time before defendants were served with this lawsuit." Omnitrans objected to this interrogatory on grounds of speculation concerning Penn Octane's or Penn Wilson's knowledge, but otherwise pointed solely to the Penn Wilson promotional brochure, and claimed that it could not answer until discovery was completed.

Special interrogatory number 17 requested that Omnitrans identify all facts to support its contention "that defendants made any misrepresentation of any material fact to [Omnitrans]."

Again, Omnitrans responded simply by objecting that the interrogatory misstated the allegations of the first amended complaint, and responded only that it "*alleges in the First Amended Complaint* that all defendants . . . agreed to hide" A&A's and Wilson Technologies's insolvency and cessation of business from Omnitrans. Omnitrans repeated its response that "the *First Amended Complaint alleges* that all defendants . . . agreed to have Safeco . . . communicate these false statements to [Omnitrans]." (Italics added.)

In other words, as Penn Wilson pointed out, Omnitrans relied exclusively on the statements in its *pleading*, but in fact adduced no *evidence* of any statement, false or otherwise, actually made by any of the defendants. This opposition was wholly

ineffective to identify any triable issue of material fact concerning the cause of action for deceit. Omnitrans bore the burden of making "a prima facie showing that there exists a triable material issue of fact. In meeting this obligation, the plaintiff may not rely on the mere allegations of its pleadings, but must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .'"[16]

Omnitrans states that "[i]t is undisputed that Safeco issued a performance bond for the project," and that "[i]t is also undisputed that the financial condition of the contractor was material to the contract." Omnitrans firmly declares that, if it "had known of A&A's financial condition or of the transfer of Wilson Technologies' assets, it would have immediately exercised its right to terminate the contract." Accepting Omnitrans's protestations as true, however, does nothing to establish Penn Wilson's liability for deceit. Similarly, Omnitrans's insistence that Remington sometimes used the title, "Director of Program Management" for Wilson Technologies, and once signed correspondence as "Director of Program Management" for Penn Wilson, does not amount to proof that Penn Wilson made any false representation to Omnitrans regarding A&A's or Wilson Technologies's status. Omnitrans's assertion that *Safeco* "affirmatively represented to [Omnitrans] that A&A was a viable entity performing work

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[16] *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 212-213.

on the Project," likewise cannot prove that Penn Wilson had anything to do with that representation.

As defendants state, Omnitrans "was unable to offer a single fact" to support its claim that either Penn Wilson or Penn Octane knew about or agreed to participate in any scheme to keep Omnitrans from learning that A&A and Wilson Technologies were defunct. There was no evidence of any material misrepresentation by either Penn Wilson or Penn Octane.

D. Deceit by Penn Octane

Penn Octane points out that there was no evidence of any communication between Omnitrans and Penn Octane; there was, therefore, no communication upon which a positive allegation of deceit could rest. The sole theory of deceit that could apply to Penn Octane, therefore, is whether Penn Octane suppressed a material fact which it had a duty to disclose.[17]

As Penn Octane suggests, there was no evidence that Penn Octane had any affirmative duty to disclose anything to Omnitrans. A "duty to disclose a material fact

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[17] *Marketing West, Inc. v. Sanyo Fisher* (USA) Corp. (1992) 6 Cal.App.4th 603, 612-613 ["[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage"].

normally arises only where there exists a confidential relation between the parties or other special circumstances require disclosure. . . ."[18] That is, there are "four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]"[19]

No such confidential relationship existed between Omnitrans and Penn Octane, and Omnitrans points to no evidence of any "special circumstances" requiring Penn Octane or Penn Wilson to disclose (or even if or when Penn Octane or Penn Wilson had knowledge of) A&A's or Wilson Technologies's status.

Omnitrans repeats its reliance on Remington's actions as a basis for its deceit cause of action. Remington's status as a special employee does not, however, prove that Penn Octane or Penn Wilson made (i.e., directed Remington to make) any false statements, that any statements Remington may have made were false, or, assuming that Remington did make false representations, that Penn Octane or Penn Wilson had any

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[18] *Cicone v. URS Corp*. (1986) 183 Cal.App.3d 194, 201.
[19] *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651.

knowledge of them. Neither was there any evidence that Penn Octane or Penn Wilson owed Omnitrans any duty to correct statements Remington made.

As defendants note, Omnitrans's showing in opposition to the motion for summary judgment failed to establish the requisite elements of knowledge or intent on the part of Penn Octane or Penn Wilson. There was no evidence to support the liability of Penn Octane or Penn Wilson for deceit.

E. Alter Ego Liability

"The two principal questions to establish alter ego are whether there is 'such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist' and whether there would be 'an inequitable result if the acts in question are treated as those of the corporation alone.' [Citation.]"[20]

Here, Omnitrans's first amended complaint alleged that there was a unity of interest between A&A and Wilson Technologies such that their corporate separateness should not be recognized. It further alleged that Penn Wilson was the alter ego of Penn Octane. Finally, the eighth cause of action alleged that "[a]dherence to the fiction of separate existence of defendants [Penn Wilson] and [Wilson Technologies] as entities distinct from defendant [Penn Octane] would permit [an] abuse of the corporate privilege

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[20] *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 244-245.

and produce an inequitable result," and that there is "a unity of ownership . . . between defendants A&A, [Wilson Technologies], [Zimmerman], [Penn Wilson] [and] [Penn Octane] . . . such that defendants [Wilson Technologies], [Zimmerman], [Penn Wilson] [and] [Penn Octane] are the alter egos of defendant A&A . . . ." This is the operative allegation of the complaint; the relief sought was a declaration that Penn Octane and Penn Wilson were alter egos of A&A, such that they should be liable for the acts of A&A.

Penn Wilson and Penn Octane had produced evidence that they observed corporate formalities between themselves. Omnitrans argues that it had "raised questions of fact as to many of the other factors relevant to determining whether the corporations were alter egos." To the contrary, however, as Omnitrans's discovery answers demonstrated, Omnitrans had no evidence supporting its alter ego claim.

Penn Octane asked Omnitrans, in special interrogatory number 13, for example, to state all facts supporting its claim that Penn Octane and Penn Wilson were the alter egos of A&A. Omnitrans replied only that its discovery was ongoing.

In opposition to the motion for summary judgment, Omnitrans relied on the declaration of Omnitrans's attorney, which primarily identified various documents, such as the Penn Wilson/Wilson Technologies invoices, the promotional brochure, the Remington letters, and the Bothwell memoranda already discussed. None of the documents provided any actual evidence that Penn Octane or Penn Wilson was the alter ego of A&A, as alleged in the first amended complaint.

For example, Omnitrans's attorney identified a "Second Amendment of the Interim Operating Agreement" between Penn Wilson and Wilson Technologies. The interim operating agreement referred to Penn Wilson's initial proposed purchase of some of Wilson Technologies's assets. That agreement eventually fell through, and Penn Wilson ultimately purchased only some of the inventory, bought the right to use the Wilson name, and hired some of Wilson Technologies's employees. Whether or not there was a second amendment to an interim agreement, which supplemented a failed purchase agreement, proves little or nothing with respect to the unity of interests or identity of Penn Octane or Penn Wilson, on the one hand, and A&A, on the other.

We have examined the referenced documents and find in them nothing to substantiate any significant relationship between Penn Octane/Penn Wilson and A&A, such that Penn Octane or Penn Wilson should be held liable for the actions of A&A. Unlike virtually all cases finding alter ego liability, A&A is not a parent, subsidiary, or sister corporation to Penn Octane or Penn Wilson.

The court properly determined that neither Penn Octane nor Penn Wilson was an alter ego of A&A; the court therefore correctly granted summary judgment on the cause of action for declaratory relief.

F. Conclusion

Omnitrans's opposition to the motion for summary judgment was wholly insufficient to raise a triable issue of any material fact; it demonstrated no facts and no evidence to support imposing liability on Penn Octane or Penn Wilson for negligent

construction of the CNG station, or that Penn Octane or Penn Wilson had engaged in any deceit. There was also no evidence supporting Omnitrans's alter ego theory.

DISPOSITION

The trial court properly granted summary judgment in favor of Penn Octane and Penn Wilson on the causes of action alleged against them. The judgment is affirmed. Defendants shall recover costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ward
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.